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Nov. 29. 1770.

A N S W E R S

F O R

JOHN BUCHANAN-KINCAID,

T O T H E

PETITION of Miss PEGGY BUCHANAN.

THE defence in this cause has been maintained on the part of the petitioner with uncommon obstinacy; nevertheless, the respondent has prevailed by no less than six consecutive interlocutors of the Lord Auchinleck Ordinary, finding the reasons of reduction of the tack, now under challenge, relevant and proved; and five several representations have been refused; in all and each of which, the abuse so liberally bestowed, has been uniformly repeated, without any the least proof, other than the petitioner's averments, and which, however foreign in most particulars to the question at issue, being obviously intended to create unfavourable impressions, cannot be passed over in silence.

In all the former steps of process, the petitioner appeared and pleaded under the character and designation of *Mrs. Margaret Buchanan*, corresponding to that stage of life to which she had happily attained, viz. the fifty-first or fifty-second year of her age. But as she seems now to entertain a most groundless conceit that her defence will meet with a more favourable reception in the character of a young gentlewoman in straitened circumstances, she has thought proper in this last stage of the cause, to act the farce of *Miss in her Teens*, under the designation of *Miss Peggy Buchanan*; and after a pathetick recital of her pre-

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tended grievances, states herself as a pattern of filial piety, and exemplary moderation, but so incompetently provided, as rendered it highly rational in the good old lady her mother, to bestow upon her a further mark of favour, (by the tack now under challenge) for her more comfortable living.

Not satisfied with this, she holds forth the respondent as a monster in nature, undutiful to his parent, and oppressing his poor *young* sister, grudging her the enjoyment of that pittance which her mother's bounty bestowed upon her, whilst he himself is in most affluent circumstances.

What truth or relevancy is in all or any of the above particulars, shall in the sequel of these answers be considered. Drapery of this sort may figure well in the outset of a cause, however foreign to the real merits thereof; but after being so repeatedly refuted, and no proof to the contrary so much as attempted, it cannot but appear singular and extraordinary, that it should still be insisted upon: And the following state of facts will, it is hoped, satisfy your Lordships how groundless and injurious it is.

The petitioner and the respondent, and another sister long ago married, and forisfamiliarized, are the only issue existing of the marriage between their common parents; so that the respondent, the only son, was undeniably the presumptive heir, both in the lands of Carbeth, the estate of his father, and in the lands of Auchinreoch the estate of his mother; and as he always behaved in a most dutiful manner to the latter, there is not the smallest appearance that she ever intended to hurt or prejudice him in his natural right of succession to her small estate.

For, though the petitioner, in the former proceedings in this cause, did not scruple repeatedly to aver, that the good old lady their mother, was resolved to have settled a distinct representation of her family in the person of her second son, the accomplishment of which had been prevented, by the respondent's having unduly obtained from her that disposition, under which he now holds that estate; this calumny was immediately refuted by an answer in fact, which the petitioner was at length obliged to confess, viz. that the younger brother was dead many years before that the mother succeeded to the estate of Auchinreoch, and

and executed the disposition thereof, in favours of the respondent her then only son.

Being beat out of this averment, the petitioner bethought herself of another equally false and groundless, viz. that it was in favours of the respondent's second son, upon whom the mother meant to have settled her proper estate, the execution of which had been disappointed by the respondent having elicited the aforesaid disposition in his favours: but as this allegation was equally unsupported by any the least evidence, other than the petitioner's *ipse dixit*, she resorted again to the averment first above-mentioned, which she had been obliged judicially to disclaim, by a writing under her hand. Truth is uniform and invariable; but it is incident to falsehood, to make its appearance in many different shapes, as most conducive to answer the end immediately in view.

The respondent was under age, when he succeeded to the estate of Carbeth by his father's death, and by the judicial rentals which his guardians upon that occasion took up, and was the rule of their after accompting, the gross rent of that estate was scrimp 2500 merks, burdened with two jointures of 500 and 900 merks to his mother and grandmother, besides extraneous debts of his father, to the amount of several hundred pounds, and 13,000 merks of provisions to the younger children.

This estate, small as it was, stood fettered with one of the strictest entails that can be conceived, with the usual prohibitive irritant and resolute clauses, *de non alienando et contrahendo*, further than as liberty was thereby granted to charge the same, to the extent of 4000 merks, for provisions to younger children, and which in no event was ever to exceed that sum.

The mansion-house of Carbeth was a very old fabrick, which had gone into such disrepair as to be in a great measure ruinous; so that when the respondent came to settle in marriage, and which in its consequences was productive of a numerous family of children, he found himself in a most uncomfortable situation, not having the means wherewith to defray the expences of the repairs necessary to make his house in some degree habitable.

What rendered his circumstances still more disagreeable was, the strict entail upon his paternal estate, whereby all that he might

might lay out, either in improving the house, or lands thereof, behoved to accrefce to his eldest son, whom he could only burden with a few thousand merks to his numerous younger children. Thus situated, the respondent considered it as injustice to these children, to bestow what little money he could save in improvements at Carbeth; wherefore, as he was the presumptive heir of the small estate of Auchinreoch, then possessed by his uncle James Kincaid; who, as well as the respondent's mother, was pretty far advanced in life, whereby there was a prospect apparently not distant of the succession opening to the respondent; and as upon that estate, there is a very good modern house fit to accommodate his family, and in excellent repair, and more especially, as that estate was a fee simple, so that his improvements thereupon would be a fund of provisions for his younger children; from all these rational views, the respondent only made such temporary repairs upon the house of Carbeth, as were absolutely necessary for the *interim* accommodation of his family; and reserved what further he could save for improving Auchinreoch on his succeeding thereto.

The respondent's father, disregarding the limitations, under which he held the estate of Carbeth, contracted sundry debts, and besides these, gave provisions to his younger children, to the amount of 13000 merks; tho' by the taillie he was limited to 4000 merks, and tho' the law would have justified the respondent, upon his succession to said estate, in refusing payment of the extraneous debts, and in restricting the younger childrens provisions, to the 4000 merks, (especially considering his own narrow circumstances, and his growing family), he voluntarily subjected himself to the payment of his father's whole debts, and of the 13000 merks to the other children; all which he has accordingly paid, and amongst these to this petitioner her moiety of the 13000 merks; and tho' he claims no merit thereby, further than having voluntarily done what he held to be a duty incumbent upon him, tho' not compellable thereto, he will be allowed to consider it as one tolerable specimen of his not being that fordid wretch which the petitioner is pleased to describe him.

After the father's death, the petitioner resided with her grandmother and mother, over whom she had acquired an intire ascendancy, and took the whole management of her affairs: and
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it is evident, she did not neglect that favourable opportunity of securing all she could to herself; for James Kincaid of Auchinreoch, having died upon the 5th of February 1761, whereby his estate devolved upon the respondent's mother, so great was the petitioner's influence over her, that the very first thing the old lady did after her succession to that estate, even before compleating her own title thereto, was to provide the petitioner in an annuity out of it. But being at that time in exceeding bad health, so that almost immediate death was expected for her, and as in that event, any deed she might execute would have been ineffectual, she was advised that it was necessary to have the respondent's concurrence to the intended provision for his sister, and with this view, the petitioner and her agent laid the plan of the deeds that were afterwards executed; and having concerted every thing among themselves, they sent for the respondent, and communicated to him his mother's intention of granting a disposition in his favour of her proper estate, reserving her own liferent thereof, and burdened with a liferent annuity of 30 l. *per annum* to the petitioner her daughter, restrictable to 20 l. in the event of her marriage, and a legacy of 1000 merks to her other daughter, and warmly solicited the respondent's acceptance thereof; offering at the same time to renounce her liferent annuity out of the estate of Carbeth, and to grant him a general disposition of what other means and effects should belong to her at her death, with the burden of what debts she should then be owing.

These offers, on the part of the mother, of granting a disposition of her proper estate, and renouncing her liferent annuity out of the estate of Carbeth, were justly considered to be of very little importance, as from the dangerous state into which she had then fallen, the appearances of approaching death were strong; but as the respondent was unwilling to thwart his mother in that state and condition, he readily agreed to every thing she proposed; and as no time was to be lost in executing what was thus agreed to, William Somerville, writer in Glasgow, the lady's ordinary doer, and who had been trusted there for that purpose, made out the deeds, in the above terms, which was so satisfying to the petitioner, that she made proper acknowledgements to him, for this additional mark of his goodwill to her.

In these terms, the mother, of this date, executed a dispositi- Feb 23.
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on, in favours of the respondent, of the lands of Auchinreoch and others therein particularly mentioned, burdened with the payment of an annuity of L. 30 sterling in favours of the petitioner, her eldest daughter, during all the days of her lifetime, after her decease, and with the payment of 1000 merks to her other daughter, *in terms of a bond of provision granted by her and her said son to her said daughters of that date, and relative hereto*, and with the further burden of paying all the just and lawful debts due by her deceased brother James Kincaid, that were owing at his death, and with the burden of her own just and lawful debts, and death-bed and funeral expences, reserving her liferent of the premises, and which she thereby obliges herself to warrant from her own facts and deeds.

The same deed contains a disposition in favours of the respondent of all goods, gear, debts, and sums of money, and other personal estate whatsoever, that shall pertain and belong to her at her death, excepting the just and equal half of her household furniture, both within and without doors, and the just and equal half of her crop and cattle, and her whole body cloaths, *paraphernalia et jocalia*; all which she thereby assigned and disposed to the petitioner, free of all debts and incumbrances whatsoever. And in respect, that the respondent had agreed to deliver up to her a bill of her deceased brother, for about L. 80 sterling, for the payment of which, she, as representing her brother, was liable, and for the other causes therein set forth, she thereby renounced in favours of her said son the liferent annuity to which she was intitled out of his paternal estate of Carbeth, and thereby also discharged him of the obligation he had come under, for payment to her of an additional annuity of 200 merks, and all other claims which she had or could have against her said son.

And as this disposition bears to be written by William Somerville, writer in Glasgow, the lady's ordinary doer, it is attested by him as one of the instrumentary witnesses, who, as already observed, had been trysted there for that special purpose, by the now petitioner: and as it has not been alleged, that the lady was in any degree incapable to know or understand what she was then doing, or the import of the deed made out in pursuance of her own special instructions, it will be obvious to your Lordships, that it was the result of a most rational transac-

on between the mother and her son, in which the petitioner's interest was not neglected; whereby, in consideration of the concessions thereby made on the part of the respondent, particularly of the life-rent annuity thereby secured to this petitioner she granted to the respondent, *per verba de presenti*, a full, absolute, and irrevocable disposition of the estate of Auchinreoch, burdened with the payment of the aforesaid annuity, and of her other just and lawful debts, with a reserved life-rent to herself, and which she thereby became bound to warrant from all facts and deeds prejudicial thereto.

This deed was not carried off by the respondent, as is falsely asserted in the petition; it was delivered by the lady herself to William Somervile her ordinary doer, with orders that he should put it into the register, which he accordingly did.

Of the same date, the respondent had concurred with his mother, in granting the bond of annuity to the now petitioner for the L. 30 during all the days of her life after her mother's death, restrictable to L. 20 in the event of her marriage; to the payment of which the respondent thereby subjected himself personally; and though the petitioner is pleased to observe that this restriction of the annuity in the aforesaid event was not mentioned in the disposition, from which she would have your Lordships to believe that the same had been improperly foisted into the bond of annuity itself, as a further instance of the alleged imposition practised by the respondent; the fallacy of this must be obvious to your Lordships at first view, in regard that as the disposition did specially refer to the bond of provision, as then executed, it was quite unnecessary and superfluous to repeat the restriction of the annuity, when the bond of annuity itself, containing that restriction, was specially referred to in the disposition. Feb. 23.
1761.

The respondent having thus ratified and confirmed all that the mother proposed in favours of the petitioner, he had reason to expect that she would rest satisfied therewith; and therefore, was not on his guard against any attempts that might be made for an increase thereof, independent of the share she had already received of the 13,000 merks; she was secured in a free life-rent annuity of L. 30 Sterling, the half of what household furniture and plenishing, insight and outfight, corns, cattle, &c. should pertain to her mother at her death, and the whole of her *paraphernalia et jocalia*, &c. and 'tis known to your Lordships, that

that many young ladies of the best families in Scotland are not so well provided.

The mother, contrary to all expectation, so far reconvalesced from the disease with which she was then afflicted, that her life was prolonged for some years; during which latter period, the management of her family, and all her other concerns, were under the direction of the petitioner her daughter, residing in family with her; and the use she made of the ascendant thereby acquired, was to elicit from her various deeds in her own favours, and amongst these the tack now under challenge.

By this tack, which is dated 7th September 1766, the lady is made to reassume the character of heritable proprietor of the lands and estate of Auchinreoch, though she had been denuded of these lands, and restricted to a liferent by the aforesaid disposition in favours of the respondent: and which was the more unpardonable in William Somerville, the framer of this tack, and to the execution of which he and his clerk are the only instrumentary witnesses, that he was both the framer and writer of the disposition in favours of the respondent, and had at that time in his hands an extract thereof; in contradiction to which, by the very next clause, he sets forth her title for granting that tack, to be the powers reserved to her of setting tacks by the aforesaid disposition to the respondent, thereby conjoining two titles inconsistent with one another, and both equally false, as she was then only liferentrix of these lands, and had no such reserved power by the aforesaid disposition, further than as her reserved liferent, did *de jure* intitle her to grant leases during the standing of her liferent; so that *res ipsa loquitur*, she must have been most egregiously deceived, when made to believe that, under either of the aforesaid titles she could grant a lease to take place at a distant period, after the expiry of her own liferent.

This tack was granted for a term of no less than nineteen years from the first term of Whitsunday or Martinmas after the old lady's death, before which period her own right behoved to be extinct. The subjects thereby leased were the mansion-house, offices, gardens, parks, &c. of Auchinreoch, situated within a few miles of the town of Glasgow, close by the turnpike road, which furnishes an immediate market for every species

cies of goods, the produce of the lands in that neighbourhood; the arable and meadow-land contained in the lease, are proved to amount to twenty-six or twenty-seven acres, some of a better quality than others; so that laying entirely out of the case the mansion-house itself and offices, the nature of things speaks it, that 100 merks must have been an elusory rent or tack-duty, for a subject of that extent and nature, not to mention the many valuable services prestable by the other tenants of that estate, which by the concurring testimonies of all the witnesses, are estimated from L. 3 to L. 5. and consist of the following particulars, the leading of whatever number of coals the family consumes; labouring the ground that is in tillage, sowing, reaping, leading, and stacking the corns; cutting down, winning, leading and stacking the hay, with various other particulars of the same nature, whereby a very considerable expence is saved in keeping and maintaining the number of servants, horses, &c. that would otherwise be requisite.

Proof, page 6.
For the extent of the services, see Proof, pages 14. D. 17. G. 20. H. 7. H. And for the value thereof see p. 4. H. 9. F. 10. D. 12. E. But all these must appear too low when calculated at the usual rates of the country; as deponed to p. 21. C. 29. B. 33. A.

If this tack had been a fair deed, no good reason can be assigned why it should have been so industriously concealed from the respondent during the mother's lifetime, or why the same should have been obtained in the aforesaid clandestine and smuggled way, none privy thereto but William Somerville and his servant.

But allowing the tack to have been ever so fairly obtained, as it was only to take place at the first term after the mother's death, the extinction of the liferent placed the respondent in the legal possession of that estate: notwithstanding of which, the petitioner thought proper, the moment after her mother's breath went out, to lay hold not only of the mansion-house and other subjects contained in this tack, without waiting for the ensuing term when the tack was to take place; but she also seized and laid hold of the whole household furniture, insight and outfit plenishing, &c. though by the aforesaid disposition, she was only provided to the half of these: what lying money, bills, or other securities she intromitted with, is yet uncertain, further than as she has been pleased to acknowledge L. 7 sterling of cash. She would not even allow what wine was in the cellar to be made use of at the funerals, but obliged the respondent to purchase these *aliunde*: with what justice or propriety then she

In the inventory referred to in her oath, p. 23. C. she condescends on 7 l. 4 s. of money found in her mother's repositories.

assumes the character of uncommon moderation, is humbly submitted.

Whatever just cause of complaint the respondent had, he was extremely unwilling to engage in a law-suit with so near a relation, he used every possible means to procure an amicable settlement; and these being rejected, he proffered a reference to any gentleman of character of her own naming. But after amusing him above a year with the prospect of ending matters by a submission, she at last refused it entirely; so that necessity, not choice, obliged the respondent to sue for justice by the present process of reduction, in which he has been most undeservedly treated with all the reproach that the most groundless resentment could suggest.

That this tack, under the circumstances above stated, was most irrational, cannot possibly admit of a dispute; if there had been cause to demand an augmentation of the petitioner's annuity, why was it not asked? he had already given pretty strong proofs of his good disposition to comply with every request of that kind in any degree rational: 13000 merks instead of 4000, was no despicable article; he had become bound to pay her an additional free liferent annuity of 30 l. over and above all the other particulars which she was entitled to by the mother's disposition; but, when not satisfied with these, she had proceeded so much further, as to procure from her mother so long a lease, and for such an elusory rent, of the only mansion-house and its appurtenances, where the respondent and his family could possibly put up, and where the proposed improvements behoved to be carried on, which could not be accomplished if he was obliged to reside at a distance, he could not but feel how ill he had been used, both in eliciting a tack of this nature, and in the improper use she was proposing to make of it.

The argument in this petition, which is but a transcript of what was so repeatedly pleaded in so many former representations, may be reduced under three heads or classes. First, the point of favour, as it preponderates the one way or the other. Secondly, the merits of the question itself, supposing the tack to be in other respects unexceptionable, and granted for an adequate rent or tack-duty, whether it is available to maintain the petitioner in the possession of these subjects during the term of years for which it was granted, in competition with the respondent

dent, the undisputed proprietor of these lands. Thirdly, The real worth and value of the subjects leased, or, in other words, whether 100 merks was an adequate or inadequate rent.

The first of these has been so fully discussed in the foregoing state of facts, that the respondent does not propose to give your Lordships the trouble of any further argument upon it, as he considers it to be impossible for any man living, who does not wilfully shut his eyes, not to perceive the irrationality of a deed of this nature, whereby the heir of the family and proprietor of the estate shall be banished from the possession of the only messuage for such a term of years: But allowing it to have been ever so rational to grant this lease, and supposing the tack-duty therein contained to be a just and adequate rent, the question remains, Whether it was in the mother's power to grant a lease of this nature for such a long term of years, to take place only at the first term after her death, when her own right of liferent was become extinct.

It is a principle universally allowed, *quod resolutio jure dantis resolvitur jus accipientis*. The mother had disposed the property of the estate to the respondent her only son and right heir, and had reserved to herself no more than a liferent, which, as a burden upon the fee, could not operate or subsist after the liferent ceased, and as the tack was only to take place at the first term after the mother's death, it was plainly *collatum in tempus in debitum*; it required an express statute to continue the tenants of liferent lands in possession till the ensuing term of Whitsunday after the liferenter's death; whereas, according to the petitioner's doctrine, liferenters, in the view of approaching death, would have no more to do, than to grant a lease for any term of years to take effect after the liferent should cease, and for a rent or tack-duty, however short of the value of the subject.

It has been assumed, as the basis of the petitioner's whole argument upon this point, that as no investment had been taken upon the disposition during the mother's life, and as any third party purchasing these lands from the mother, and obtaining the first investment, must have been preferable to the prior personal right in favours of the respondent, she, the petitioner, must be equally preferable in right of this tack, when cloathed with possession prior to any investment in the person of the respondent, or any possession obtained by him.

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The respondent has no occasion to dispute this principle, so far as regards the preference of real rights in competition with one another, where the priority of infestment gives the preferable right.

But tacks of lands stand upon a very different footing; of their proper nature, they are mere personal rights effectual against the granter and his heirs, but ineffectual against purchasers; and tho' the law in this particular, was in so far altered by statute, as to render tacks granted for an adequate rent, and cloathed with possession, available against singular successors; yet the law in all other respects, stands precisely where it did, the priority of infestment, is the rule of preference in competition of real rights; but no lawyer, so far as the respondent knows, or is informed, has said that infestment is requisite to secure a singular successor against a tack of whatever date prior or posterior, if not cloathed with possession prior to the purchase.

In personal rights, it is a clear case, that the rule of preference is *prior tempore potior jure*; but there is not place for a question of that kind in the present case, because tacks being of their nature mere personal rights, it is the statute only that gives them force against singular successors, upon supposition of their being not only of a prior date, but cloathed with possession.

That the tack in question, is in point of time several years posterior to the disposition in favours of the respondent, and even to the registration thereof is clear from comparing the several dates, and being only to take effect from the term after the mother's death; it is inconceivable how it can be maintained, that it was cloathed with possession from the moment of the mother's death, or that any possession assumed by the petitioner at her own hand, can be pleaded as a ground of preference in competition with him.

Was it necessary, he might with much greater propriety maintain, that the disposition in his favours was cloathed with possession from the moment it was granted, by reason of the liferent reserved to his mother; it being an established principle in all questions of this nature, that the possession of the liferentrix is the possession of the fiar.

But laying the liferentrix's possession entirely out of the case, and suppose the disposition in favours of the respondent had
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not taken place sooner than the mother's death, how is it possible, that this tack which was only to take effect at the term after the mother's death, could be cloathed with possession prior to that term?

But all this is out of the case; the reserved liferent entitled the mother to grant leases for such a term of years as her liferent should subsist; but which could never authorise her granting a tack even for an adequate rent, to take place from a term after her liferent had ceased.

The petitioner, justly diffident of prevailing upon this point, resorts to a different plea, which, if rightly understood, amounts to this, that as the disposition was granted with the burden of debts, and as the mother in granting this tack bound herself in warrandice thereof, the respondent cannot be allowed to challenge the same, because the warrandice in the tack being a debt of his mother, he is liable to make good that warrandice.

The respondent does not dispute his being liable to pay his mother's just and lawful debts, however incautious it was in him, even in the state and condition in which his mother then was to have submitted to a condition of this nature.

But allowing him, by the acceptance of this disposition, to be ever so firmly bound in payment of his mother's just and onerous debts, it is impossible seriously to argue, that under the word *debts* can be comprehended deeds of this kind, however onerous, and far less gratuitous deeds, calculated to defeat the prior right in his favours.

And to illustrate this, let the case be supposed, that instead of a tack, the petitioner had obtained a disposition of the estate, with the most absolute warrandice, it will not be seriously maintained, that the respondent, under the obligation to pay his mother's debts, could have been liable in the warrandice thereof, as the granting such deeds would have been a contravention of the warrandice in the disposition to him; the obligation he came under by that very deed to pay his mother's debts can never be understood to import an obligation to acknowledge the mother's deeds of contravention of the disposition to him, with absolute warrandice against all acts and deeds of her's prejudicial thereto.

This tack was the free voluntary act of the mother, arising from no antecedent obligation, but merely gratuitous upon her

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part; so that allowing it to have proved ever so ineffectual from any defect of title in the mother's own right, how ungracious an appearance must it have had, should the petitioner have brought an action of damages upon the clause of warrandice, either against the mother herself, or her heirs? But, it is unnecessary to chase difficulties which don't apply to the case, as the respondent rests secure, that it is impossible your Lordships should be of opinion that the obligation which he came under to pay his mother's debts can subject him to the warrandice of a deed of this nature, counteracting the warrandice in the mother's disposition to him.

Neither can it avail the petitioner, that by the same disposition the respondent is assigned to the executry or personal estate that should belong to his mother at her death; the petitioner can best inform what the amount of the executry was, as she laid hold of the whole: but, be the amount greater or less, it can never infer an universal passive title; and the Lord Ordinary has reserved action, as accords of the law, upon the warrandice of the tack; she is already possess of the executry funds, out of which her claim of damages on the warrandice of the tack, if at all founded, would fall to be made good; but that this should entitle her to continue the possession so unduly usurped, of the mansion-house, &c. till the other question, respecting the claim of damages upon the warrandice of the tack, can be ascertained, is what your Lordships will never agree to. Processes of removing are intitled to dispatch; this process, which concludes for a removing, has already been protracted but too long, when no less than five representations, all upon the same point, have been presented, and refused; and, as it is impossible to lay what further space of time might be consumed by proofs, and otherwise, for ascertaining the extent of the executry funds, which, by the like artful management, might be spun out for many years, it is impossible she can seriously mean that she should be continued in possession of the subjects in this lease, till all these other matters can be finally settled.

Thus far the argument has proceeded upon the supposition, that the tack-duty of 100 merks was an adequate rent for the subjects in this lease, for a term of no less than 19 years; but, as from the depositions of the witnesses annexed to the petition, it appears to be incontestibly proved, that it is a mere elusory
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tack-duty, in no degree adequate to the value of the subjects, granted to a most conjunct and confident person, and in prejudice of a prior disposition granted to the respondent, of which the petitioner was in the full knowledge, he cannot conceive upon what principle of law or justice it can be maintained, that this tack should be obligatory upon him.

The respondent does not mean to say, that any trivial difference ought to influence the determination of this or any similar question; but, if it shall appear to your Lordships, and which he is confident it will, that this tack is a mere *color questus*, and the tack-duty in no degree adequate, justice will not permit that so unfair a contrivance should prevail.

It requires no positive evidence to satisfy any disinterested person, that 100 merks must, in the nature of things, be a most inadequate rent for a mansion-house, such as this is described to be, with suitable offices, and twenty-six or twenty-seven acres of inclosed ground, partly arable, partly meadow, within a few miles of the city of Glasgow, close by the turnpike-road, having the benefit and advantage of all the above-mentioned services, prestable by the other tenants of this estate.

But, when to this is added, what is deposed to by the witnesses on both sides, whatever freedom might have been taken before the proof, it is matter of just surprize she should think herself at liberty to dispute a fact so incontestibly proved.

The witnesses adduced on the part of the respondent, are either gentlemen of fortune and character, or substantial farmers, residing in the neighbourhood, and who from their own knowledge and experience in such matters could be at no loss to say what was the real worth and value of these subjects; and any seeming difference in the estimates, by them severally made, is so far from being favourable to the petitioner, that it demonstrates how inadequate and elusory a tack-duty this is, as, by the lowest estimation, the tack-duty is not equal to a third or fourth of what any common farmer would or might give for the grounds themselves, independent of the mansion-house, offices, &c. or as holding it to be of no higher estimation than a common farm-house.

Was there any material contrariety in the witnesses, the respondent should consider it as incumbent upon him, to have stated and examined the *dicta* of each witness, compared with those

For the value of the subjects, see Pursuer's proof, p. 4. E. 5. H. Pur.

Pursu. proof, those in the opposite scale, but as that is by no means the case,
 P. 7. G. 9. E. and as the witnesses on both sides seem to agree in this general
 10. C. 11. H. proposition, that the tack-duty of 100 merks is not equal to
 12. A. 13. H. one third or one fourth of the real worth, independent of the
 Defender's proof, 28. F. services, which they estimate to be from L. 3 to L. 5, and as
 29. G. 32. G. your Lordships have a full copy of the proof annexed to the pe-
 30. A. tition, he is unwilling to consume your Lordships time, by a par-
 ticular discussion of the *dicta* of each witness, in the humble re-
 liance, that upon the general complexion of the proof, your
 Lordships must be of opinion, that it is such as is above stated,
 and that upon a medium, the rent ought to be from L. 20 to
 L. 25 sterling, and with the benefit of the services from L. 3 to
 L. 5 sterling more.

One general exception has been taken to the mode of proof,
viz. that the valuation which the witnesses have put upon these
 subjects is merely conjectural, which is in other words to say,
 that they are incapable of estimation, because, they have not
 been in use to be let for rent in the memory of man, having
 been always kept in the heritor's natural possession; how just
 that consequence is, is humbly submitted: are not proofs of
 this nature every day resorted to, and allowed in processes of
 valuation of tiends, modifying and localling ministers stipends,
 and others of the like nature? It is a general rule without excep-
 tion, that the best proof the nature of the case will admit of
 ought to be taken; no other proof in this case was practicable,
 both parties betook themselves to it, and it is extremely remark-
 able, that though the witnesses adduced on the part of the pe-
 titioner, have endeavoured to bring it down as low as possible,
 even they make it to be triple the value of the tack-duty, inde-
 pendent of the services.

Proof, page 12. A. But it is by no means a proper rule of valuation, to estimate
 this mansion-house, with the offices thereto pertaining, at
 the same rate with a suitable farm-house. These articles ought
 to be rated according to the benefit and advantage which they
 yield to the proprietor of the estate, for the residence of himself
 and family, without regard to the value or rent of a farm-house,
 suitable to the farm itself: there is no person living who would
 surrender the mansion-house of his family at so inadequate a rent
 or value. But there is no occasion to push this consideration
 farther,

farther, as the lowest rent deposed to by the witnesses on both sides, is so far above this nominal tack-duty.

A proof was brought of the rent, payable by William Stirling for those parts of the Mains of Auchinreoch possessed by him; and supposing the whole of these grounds to be of equal value, corresponding to the extent of each, this comparative estimation *pro rata* of the extent of the ground of which they severally consist, is insisted upon as a more just rule of estimation than the conjectural rent deposed to by the witnesses.

This compariton is most improper and inconclusive: it is now thirteen years and upwards since Stirling obtained his tack from James Kincaid the respondent's uncle, a good-natured easy man, who gave little attention to his affairs; his farm consists of above eighty acres, for which he pays L. 30 Sterling, and ^{Proof p. 15. F.} sixteen bolls meal, all publick burdens and casualties corresponding thereto, which, at the usual conversion, brings up his rent to L. 50 Sterling or thereby, that is about twelve shillings Sterling *per acre* over-head; and when Stirling's tack shall be out, which it will be in a few years, there is an absolute certainty that it will set for double the rent, as it is now sublet for a surplus rent of L. 20: but taking matters as they stand, and supposing Stirling's present rent was to be assumed as the rule for ascertaining an adequate rent for the subjects in this lease, the rent or tack-duty would by that computation amount to between L. 14 or L. 15 Sterling, over and besides the value of the services.

Were such comparative proofs to be allowed, it would render questions of this kind inexplicable; and 'tis absurd to suppose that in the petitioner's treaty with her mother in settling this tack-duty, any regard could be had, or enquiry made into the rent payable for other farms, or the quantity and value of the ground in each.

And to evince the absurdity of this, and in opposition to the letter from the tenant of Balwharige, contained in the petition, there is in process a letter from Mr. Lennox of Woodhead, certifying, that he gets L. 3 Sterling *per acre* of rent, for 24 acres of inclosed ground in that neighbourhood belonging to him; and another letter from Mr. M'Farlane of Kerkton, attesting, that the house, offices and gardens of Kerkton, with 17 or 18 acres of land, are let to his nephew for L. 30 rent, and the te-

nant bound to uphold the house, offices, garden-walls and hedges upon his own expences. And was Mr. M^rFarlane disposed to turn out his nephew, he could easily command L. 40 of rent for these subjects; besides, the comparison with Balwharige does not apply, for the extent of ground in that farm, is not triple the quantity of what is granted to the petitioner by this lease, and yet the tenant of Balwharige pays five times her rent.

In the close of the petition, the respondent is accused of with-holding payment of the annuity of L. 30. and of having presented two bills of suspension of the charges he had received for payment of the annuity, both which were refused by the then Lord Ordinary upon the bills; and this she offers as a further proof of the respondent's alledged severity to her; and as this is the petitioner's last effort, to give your Lordships an unfavourable impression of the respondent's conduct, however foreign it must appear to the cause, he cannot pass it over in silence; and when the fact shall be fairly stated, he persuades himself she will be equally unsuccessful in this as in the other attacks which she has been pleased to make upon him.

It was in the month of July last that the first demand was made upon the respondent for payment of the annuity which he offered instantly to pay, but demanded allowance of L. 7:4 s. Sterling, which the petitioner confessed she had found in her mother's repositories, and to which he had right by the disposition in his favours; and as she had possessed under the lease for two years, and thereby was debtor in 200 merks as the rent or tack-duty of these subjects, he insisted also to have allowance or deduction thereof, which, to the petitioner's doer, appeared so just and reasonable, that he desired to have the scroll of such a discharge as was proper for the petitioner to grant: this was accordingly furnished; but in a day or two thereafter, the respondent was given to understand that the petitioner would not agree to allow either of these deductions out of the annuities without assigning any reason for such refusal, other than her will and pleasure; and as she thereupon proceeded to charge him with horning, he presented the first bill of suspension, wherein he repeated the offer to pay the annuities charged for, with the aforesaid deductions.

The petitioner's agent took up the bill to answer, and after keeping it two weeks, in place of returning it with his answers to the bill-chamber, in the usual way, he sent it directly to the Lord Ordinary. The case had been but very curtly stated in the bill; the answers were full of misrepresentations; but as the respondent had no opportunity to see or contradict the same, the Lord Ordinary, of this date, refused the bill. Aug. 8.

A second bill of suspension was presented, in which the matter was stated more fully, and a caveat entered at the bill-chamber, that the answers should not be advised till they should be seen by the respondent's agent, who, in daily expectation of them, remained in town till the third of September, when being necessarily obliged to leave Edinburgh for a short time, he left orders with his clerk to borrow up the bill and answers how soon they were returned, and to transmit a copy of the answers to him in the country, where he would have an opportunity of showing them to the respondent himself, and receiving proper instructions from him for drawing the reply. Aug. 22.

The bill and answers were accordingly borrowed up as soon as presented, and a copy thereof transmitted to the country for the purpose above-mentioned; but before any return could be made thereto, the petitioner's agent took an instrument of protest, requiring that the bill and answers should be returned; which not being immediately complied with, he went directly to the Lord Ordinary on the bills, insisting to have the bill of suspension advised on the office copy: and though in the expectation that something of this kind would be attempted, a representation had been presented in name of the respondent, praying to supersede advising the bill for a few days, when the respondent's agent would be in town, with proper materials for the reply: Yet to frustrate this, the petitioner's agent at the same time wrote a letter to the clerk of the bills, falsely representing these annuities to be the petitioner's only fund of subsistence; that by these being withheld, she was truly in a starving condition. The Lord Ordinary was pleased *de plano* to refuse the bill; and the petitioner's after-conduct demonstrates, that her sole purpose in hurrying on matters so precipitately, was, that by means thereof she might have an opportunity of putting a personal affront and disgrace upon the respondent her brother.

For though the post goes six days in the week to that country, it would have been too great an indulgence to have delayed sending the caption till the regular hour of the post's setting off; a messenger was therefore dispatched with the caption, upon a calculation that he would be there in time to catch the respondent at a public fair at Killearn which he usually frequents, and where the caption might be executed in the most public manner: he was accordingly apprehended in the public market, the messenger insisting that he should go immediately to prison, and to which he must have submitted, as he had not so much money in his pocket as to discharge the debt, had he not found a neighbouring gentleman who interposed for his relief.

And in this view of the case, it is submitted to your Lordships with what justice or propriety this incidental dispute about the payment of the annuities then due is resorted to for proof of the respondent's alledged severity to her; or whether, *e contra*, she did not push her resentment in a most unbecoming manner, when, after having prevailed by her nimious diligence in getting the bills of suspension refused, she gratified her resentment by having him apprehended with a caption in the public market of Killearn; though the whole of this incident is so foreign to the cause, that the respondent should not have thought himself at liberty to have taken any notice thereof, had he not been compelled thereto by this new charge of severity exhibited against him.

The petitioner's plea of poverty is no better founded than her other plea of youth and inexperience, the last of which will probably now be given up, however unwilling ladies may be to acknowledge their having past the line: The respondent was so well apprised of the petitioner's delicacy upon this point, that he avoided saying any thing about it till she pleaded her youth as an aggravation of the respondent's alledged severity, and therefore must blame herself, if she has forced a discovery which may not be palatable.

Her necessitous circumstances are equally affected; had she no more but the annuity of 30 l. and the share she received of the 13000 merks, she would be better provided than many young ladies of the first rank in this country; but it is certain fact, that during the time she lived in family with her uncle and mother, she was so industrious as to pick up a pretty round sum
which

which she now enjoys : So that upon the whole, she is truly in most affluent circumstances.

The petitioner takes upon her to assure your Lordships, that the respondent's avowed purpose of applying his time and labour to the improvement of Auchinreoch, and consequently the necessity of his residing there, is a false pretence ; for that the whole of these grounds, other than those set in tack to her, are under lease for ten or eleven years, which therefore puts it out of his power to carry on these mighty improvements, of which he makes so pompous a display.

It might suffice for answer, to call upon the petitioner to point out the proof of these facts so boldly averred. She was allowed a proof at large of every fact, that she might be of opinion was in any degree material ; but as she could not be ignorant, that this allegation was void of all foundation, she very wisely declined attempting any proof thereof : and the respondent does averr it to be an absolute fiction, in regard that tho' some part of the grounds are under lease for some years, particularly the Mains, there are at this moment no standing leases upon more than the half of the estate ; and it is upon these the respondent means to begin his improvements, not to mention that the tenant of the Mains has agreed to surrender his lease thereof.

She concludes with an appeal to the experience of some of your Lordships, that his Sister's constant residence, and her faithful and attentive superintendence of her brother's country affairs contribute greatly to their success.

It does not become the respondent to say which of your Lordships are here appealed to, tho' it may not be matter of great difficulty to discover the persons thereby intended : the appeal is at any rate improper, and if the petitioner is disposed to bring this to a comparative trial between the two sisters, respecting the proof they have given of their love and affection to their brothers, and an attention to his interest preferable to their own, it is believed the petitioner will not find her account therein.

The petitioner endeavours to avail herself of the respondent's alledged severity to the three natural children of James Kincaid, late of Auchinreoch, in the challenge made of their small alimentary provisions ; but what entitles the petitioner to complain in their names,

names, she has not thought proper to explain; when the children themselves complain, they shall have an answer which will be very short and satisfying, viz. that as when the summons was raised, the respondent did not know in what terms these bonds had been conceived, they were included in the summons *in cumulo* with the rest, and when produced, the respondent was so far from signifying any such purpose as is here ascribed to him, that he ratified and confirmed the same.

It may be noticed, before concluding, that tho' the petitioner has denied her having right to the services prestable by the tenants, yet it is in proof, that she received them the first year after her mother's death; but finding the respondent argued from them to show the lowness of her rent, she would not receive them since; but as they are only payable to the person residing in the house of Anchenreoch, she only can reap the benefit of them; and there is no doubt, if your Lordships were to sustain her tack, that she would resume them, as the tenants do not dispute her right to them; and so far from being bound to perform them to the respondent, they absolutely refuse either to perform or allow him any consideration for them.

It only remains to observe, that the petitioner alledges the respondent lay by and allowed his mother to enter into tacks and minutes of tacks without disputing her powers. This is equally false with all her other alledgances; for the lady never granted any tacks, or entered into any minutes, so far as the respondent knows, posterior to the date of the disposition, excepting the tack to the petitioner. So soon as the respondent heard of that tack being granted, he went and questioned Mr. Somerville concerning it, who acknowledged the writing it, but said, neither he, nor his clerks could get peace for the petitioner, till it was written.

And therefore, to conclude these answers, which the respondent's anxiety to justify himself from the foul imputations with which he was charged, has drawn out to so much a greater length than was necessary, he flatters himself, with the hopes, that your Lordships can have no difficulty in adhering to the Lord Ordinary's interlocutors.

In respect whereof, &c.

ALEX. LOCKHART.